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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

Robert Cheney, Petitioner/Appellant, vs. Department of Correction, Respondent.	IPC NO. 97-15 **DECISION AND ORDER ON PETITION FOR REVIEW**

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on June 18, 1999. Petitioner/Appellant, Robert Cheney (Cheney or Petitioner) was represented by Robert J. Williams, Esq.; Respondent, Department of Correction (DOC) was represented by Ron Christian, Deputy Attorney General. The petition for review involves the hearing officer's decision dated February 4, 1999. **We Affirm**.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Facts.

Cheney was a classified employee of the DOC from 1985 until he was dismissed in July 1997. At the time of the disciplinary dismissal which gave rise to this appeal, Cheney was a sergeant at the Idaho Maximum Security Institution (IMSI).

Cheney's dismissal was based upon three separate and unrelated incidents: alleged sexual harassment, failing to properly supervise his subordinates, and violations of the DOC's anti-tobacco policies. The hearing officer determined that DOC did not prove the sexual harassment and negligent supervision causes by a preponderance of the evidence and DOC did not seek a review of those issues. Thus, only one basis of the discipline, the allegations concerning violations of DOC's tobacco policies, are at issue in this petition.

In November 1995 the DOC developed its Policy No. 104 which, when implemented, would prohibit the possession or use of any tobacco product in any DOC facility, on any DOC controlled property, and at any DOC work site or situation (e.g. fire-fighting camps, road crews, etc.). The policy would apply to inmates as well as employees, contract employees, citizens and visitors.

Because the elimination of tobacco from DOC facilities was expected to be a difficult and controversial process for inmate and staff alike, the policy was not implemented until November 1996. The delay in implementation was intended to give all affected individuals time to adjust to the policy, and seek assistance in breaking tobacco-related habits for individuals who wished to do so.

The tobacco-free workplace policy was implemented in November 1996. The record provides ample testimony that tobacco use continued at DOC facilities and on DOC property following implementation of Policy 104. Among those who continued to possess and use tobacco in violation of the policy were Petitioner, some of his subordinates, and other supervisory personnel. The deputy warden of security at IMSI testified that during the first couple of months that the policy was effective, violators were verbally warned and their tobacco was confiscated. When the deputy warden had reason to believe that tobacco use was continuing after the first of the year, she called a meeting of IMSI staff, which became

commonly known as the "amnesty" meeting. There was conflicting testimony concerning when the amnesty meeting actually occurred (one witness testified with some certainty that the meeting was February 14, 1997), but all witnesses agree the meeting occurred early in 1997, either January or February. The message of the meeting was that there would be no discipline for any tobacco violations which occurred after implementation of the policy but before the amnesty meeting, but following the meeting, there would be a zero-tolerance policy for proven violations. Cheney was on annual leave and did not attend the amnesty meeting.

In June, two of Cheney's subordinates were caught smoking in the recreation yard at IMSI. An investigation ensued and revealed that Cheney knew some of his subordinates were smoking in the facility in violation of Policy 104, that Cheney apparently condoned such use, that Cheney himself possessed and used tobacco inside the facility in violation of Policy 104, and that Cheney smoked in the company of his subordinates. Cheney admitted that he had violated Policy No. 104 by introducing tobacco into the institution, by using tobacco in the institution, and by allowing his subordinates to use tobacco in the institution.

On July 10, 1997, Cheney received an Amended Notice of Contemplated Disciplinary Action. Pertaining to the tobacco violations, the notice alleged that Cheney had violated DOC Policies 104 (tobacco-free workplace) and 217-A (2) (14) (employee conduct) and IPC Rule 190.01.a (failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the department or the Personnel Commission). Cheney responded to the Amended Notice of Contemplated Disciplinary Action on July 24. In his response to the charges he violated the tobacco policy, he admitted that he had brought tobacco into IMSI, had smoked in the facility, allowed subordinates to use tobacco in violation of the policy, and had smoked with his subordinates in the facility.

The DOC, after reviewing Cheney's responses to all three allegations, dismissed him effective July 28, 1997.

B. Appeal to Personnel Commission.

Cheney filed a timely appeal of his dismissal and the matter was assigned to Kenneth G. Bergquist. A hearing on the appeal was held February 17-19, April 28-29, May 1 and May 7, 1998. The hearing officer issued his Findings of Fact and Conclusions of Law and Order on February 4, 1999. The hearing officer determined that DOC had failed to prove the allegations regarding sexual harassment and failure to supervise. The hearing officer found that DOC did prove the allegations regarding violation of the tobacco policy (Policy No. 104), together with the corollary violations of DOC Policy 217-A(2) (14) and IPC Rule 190.01.a by a preponderance of the evidence. Based on these findings, the hearing officer upheld Cheney's dismissal.

Cheney filed a timely petition for review. The DOC did not appeal the hearing officer's findings or conclusions regarding the two allegations which the hearing officer determined were unproven.

II.

ISSUES

Cheney raised a number of issues on appeal. Paraphrased for brevity they are:

A. Did the hearing officer err in upholding Cheney's dismissal when two of the three stated reasons for the dismissal were not supported by legally sufficient cause?

B. Did the hearing officer err in upholding Cheney's dismissal when the discipline imposed was allegedly inconsistent with DOC's policy for administering discipline?

C. Did the hearing officer err in upholding Cheney's dismissal when the discipline imposed by DOC was allegedly inappropriate for the offense charged?

D. Did the hearing officer err in upholding Cheney's dismissal because the DOC did not use progressive discipline?

E. Did the hearing officer err in finding that Cheney introduced contraband into a DOC facility?

F. Did the hearing officer err in upholding Cheney's dismissal where the DOC had recommended discharge before providing Cheney notice and opportunity to respond?

G. Did the hearing officer err in upholding Cheney's dismissal because DOC prohibited Cheney from discussing the sexual harassment allegations with co-workers?

H. Did the hearing officer err in upholding Cheney's dismissal when the DOC dismissed him without providing him notice that the tobacco policy could be enforced against him?

III.

STANDARD AND SCOPE OF REVIEW

The standard and scope of review on disciplinary appeals to the IPC is as follows:

> When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.
>
> On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may

> affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Dep't of Health and Welfare, IPC No. 94-03 (February 21, 1996), *aff'd.*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998) (footnote omitted).

IV.

ANALYSIS

The issues before the Commission on petition for review are straightforward and involve only questions of law over which we exercise free review. It is undisputed that Cheney violated the tobacco policy. The only remaining questions concern the choice of discipline, and whether Cheney received the process to which he was due.

1. The hearing officer did not err in upholding Cheney's dismissal when two of the three stated reasons for the dismissal were not supported by legally sufficient cause.

Cheney correctly notes that the original basis for his discharge rested upon three separate and unrelated allegations of "cause.": sexual harassment, failure to supervise his subordinates, and violations of the tobacco policy. The hearing officer found that the DOC was not able to prove the first two allegations by a preponderance of the evidence. Cheney argues that all three reasons for his dismissal which were specified in the notice of contemplated action must be proven or the entire disciplinary proceeding fails. This argument is without merit. Idaho Code § 67-5309(n) is clear that any one violation, when proven, can constitute proper cause for dismissal. IPC Rule 190.01 is in accord. *See also, May v. Idaho Dep't of Health and Welfare,* IPC No. 96-01, 1997 IPC Reports 1, 9:

> The IPC Rules mandate that the department, in a discipline case, carries the burden of proof by a "preponderance of the evidence." That is, the department must prove *at least one* of the 17 proper cause reasons for

> discipline, as listed in Rule 190, by a preponderance of the evidence. (emphasis added).

In this case, DOC alleged three proper cause reasons to dismiss Cheney. The three causes were neither elements of the same offense, nor did they arise out of a single incident or event. There is nothing in the record to suggest that DOC's decision to dismiss Cheney was a result of the three events in combination. Each one standing alone, if proven, could justify the imposition of discipline.

There is no doubt that the DOC proved the tobacco violation by a preponderance of the evidence. The Petitioner admitted that he violated the tobacco policy. He admitted that he introduced tobacco into the institution, that he smoked within the IMSI facility, that he allowed his subordinates to bring in tobacco products and use them inside the facility, and that he joined his subordinates on occasion in violating the tobacco policy.

The DOC charged Cheney with a violation of its Policy 217-A(2) (14) which prohibits "bringing contraband into a correctional facility." Cheney argues that tobacco products are not contraband because they could never endanger the security of the institution. Petitioner overlooks the fact that in a prison setting even non-lethal items can raise security concerns. If Petitioner was willing to risk his livelihood for a cigarette, one hesitates to consider what an inmate might do for a smoke. Further, use of tobacco by the staff can provide inmates with information they can use to bargain for favorable treatment from staff. These are both circumstances that impact the security of a penal institution. The DOC's determination of what constitutes contraband is an exercise of the agency's expertise, which we decline to overturn.

In summary, once tobacco was prohibited by DOC policy, it became contraband within the institution. When Cheney knowingly brought tobacco into the institution, and used it in front of his subordinates, he violated DOC Policy No. 217-A(2) (14).

2. ***The hearing officer did not err in upholding Cheney's dismissal even if the discipline imposed was inconsistent with DOC's policy for administering discipline, was unduly harsh for the offense charged, was not progressive in nature, or was imposed without prior notice.***

Cheney's argument that his dismissal was inappropriate rests on four presumptions: (1) that DOC policy requires that discipline be progressive; (2) that it be consistently applied; (3) that the punishment fit the crime; and, (4) that he was entitled to notice that the policy could be enforced against him. Cheney argues that his discipline did not meet any of these tests.

The DOC policy regarding discipline (DOC Policy No. 205) encourages the use of "corrective discipline" for all but major offenses. The policy provides a ranked listing of possible corrective discipline from the least severe (oral warning) to the most severe (dismissal). Cheney contends that he was *entitled* to the full panoply of progressive discipline before he could be terminated. Petitioner's argument fails for several reasons. First, the DOC policy is clear that the array of penalties does not guarantee a sequential progression of discipline, and that a number of factors must be taken into consideration in deciding what discipline to impose. Secondly, the concept of progressive discipline does not apply to major offenses. Bringing contraband into a DOC facility is not only a violation of DOC policy, it is also a misdemeanor. Committing a misdemeanor in a penal institution is clearly a major offense.

Next Cheney argues that to be upheld, his discipline must be consistent with the discipline received by other violators of the tobacco policy. Cheney contends that other

supervisors were disciplined less harshly than he was for similar violations. There is much testimony in the record about who violated what policy when and what their punishment was. It is clear that at least one other supervisor was discharged for violation of the tobacco policy. It is not clear that others who were alleged to have violated the policy were quite as culpable as Petitioner. Many allegations were unproved, others which were admitted or proven occurred prior to the amnesty meeting, or did not involve violating the policy in cohort with subordinates, or did not involve knowingly allowing subordinates to violate the policy, or involved accidental or inadvertent introduction of tobacco into the facility. In any event, consistency of discipline is a laudable goal, but it is not an entitlement. The DOC's policy on discipline is just that: a policy; it is not a statute, and it confers no substantive rights.

Next, Cheney argues that the discipline he received was not proportionate to his misdeeds. This Commission addressed an identical claim in *Webster v. Department of Health and Welfare,* IPC No. 96-14, 1997 IPC Reports 67, 74 where we stated:

> Webster argues that even if grounds for discipline exist, dismissal was inappropriate and excessive under the facts of her case. As specified by statute (Idaho Code § 67-5309(n)) and rule (IDAPA 28.01.01.190.01), any of the listed causes can justify dismissal. In this, as in any other disciplinary matter, [the Department of Health and Welfare] had a choice as to the type of discipline it wished to impose and it chose dismissal. So long as there is substantial evidence supporting the Hearing Officer's determination that DHW proved, by a preponderance of the evidence that it had "proper cause" to impose discipline, this Commission will not second guess the Department's choice of discipline.

The hearing officer correctly noted this precedent in his decision in Conclusion of Law XIII (amended):

> Counsel for Cheney has made a strong argument that the Department should reconsider his dismissal for the smoking violation where the Department has not dismissed any of the other approximately 20 Max employees, including supervisors, for the same violation. Regrettably, in this case, prior Commission decisions do not permit me to question the Department's choice of discipline where there has been a finding of proper cause. *Webster v. Department of Health and Welfare*.

Webster means exactly what it says. Discipline is a discretionary function retained by the agency—in this case, the DOC. It is this Commission's function to ensure that proper cause is duly proven. It is not this Commission's function to impose its views regarding an appropriate type of discipline upon agencies that may have management concerns and exigencies that are beyond our expertise or understanding.

Finally, Cheney argues that the tobacco policy should never have been enforced against him without warning him. Cheney claims that the DOC's action in doing so was arbitrary and capricious.[1] There is no dispute that Cheney was not at the amnesty meeting. There is dispute about whether Cheney was specifically advised of the zero-tolerance policy following the amnesty meeting. What is clear is Cheney's testimony at the hearing wherein he admitted that he knew about the tobacco policy, and that violation of DOC policies could result in discipline. Cheney may claim to have been taken aback by the severity of the discipline he received, but given his testimony, he can hardly claim unfair surprise that he was disciplined.

In summary, Petitioner attempts to shift the focus from whether he violated a DOC policy and IPC rule to the severity of his punishment. But this Commission has consistently taken the position, in accordance with Idaho Code § 67-5309(n) and IPC

Rule 190.01, that once an agency has proven cause to discipline, the choice of discipline remains with the agency.

3. The DOC did not, as a matter of law, deny Cheney the due process to which he was entitled.

Cheney raises three areas in which he believes he was denied due process. First, he claims that he had no meaningful opportunity to respond because the decision to terminate was made before the notice of contemplated action was sent. Second, Petitioner contends that the order he received not to discuss the sexual harassment investigation with coworkers interfered with his ability to provide a meaningful response to the allegations. Finally, Cheney argues that he was denied the right to representation because the notice of contemplated action which he received did not inform him of his right to representation during the disciplinary process. None of these arguments are persuasive.

The law in Idaho is clear that due process in the context of an classified state employee requires only notice and an opportunity to respond prior to dismissal. Full due process occurs post-termination in the appeal process. *Arnzen v. State of Idaho*, 123 Idaho 899, 854 P.2d 242 (1993), *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985).

Phyllis Blunck, Personnel Manager for DOC, clearly testified at pp. 482-483 of the hearing transcript that the purpose of a notice of contemplated action was:

> . . .to give him notice that based on a summary of the information that we had . . .before that final decision was made, to give him an opportunity to respond. . . It's an

[1] It should be noted that the Idaho Courts have previously determined that arbitrary agency actions are not matters that are appealable to this Commission. *Stroud v. Dep't of Labor and Industrial Services*, 112 Idaho 891, 736 P.2d 1345 (Ct. App. 1987).

> opportunity for us to take a second look at things to see if we've made a mistake or if they've pointed out something that we didn't know before or whatever. It's just a notice to the – we call our due process to give them notice that we are contemplating action and give them a chance to respond.

Certainly DOC had to have some idea of what discipline they intended to impose on Mr. Cheney, or a notice of contemplated action would truly have been meaningless. Contemplating the dismissal of an employee is not the same as making a final decision to dismiss. In this case, the DOC contemplated dismissing Petitioner and advised him that fact. He did respond and his responses, including his candid admission of the tobacco violations, resulted in the final decision to dismiss. Petitioner in his brief even refers to the contemplated action as a "recommendation." Petitioner's argument that he was denied a meaningful opportunity to respond appears to be based on little more than conjecture or wishful thinking. Certainly the record belies the argument.

Cheney next claims that he was denied due process because he was directed not to discuss the sexual harassment investigation with coworkers. The hearing officer determined that DOC failed to prove the sexual harassment allegations and DOC did not appeal that finding. It is unclear how this issue could have impacted Cheney's ability to respond to the allegation which is the subject of this appeal.

Cheney also claims that he was denied due process because the notice of contemplated action that he received did not advise him of his right to representation. There is nothing in Idaho Code § 67-5315 or IPC Rule 200.06 that requires that the notice of contemplated action include notice of the right to representation. IPC Rule 200.06 does require that somewhere in the procedure the employee be informed of the right to representation. Petitioner was informed that his disciplinary process was being

conducted under the IPC rules. Even assuming, arguendo, that DOC failed to notify Cheney of his right to representation, it does not follow that DOC denied Cheney representation. Cheney obviously knew he could have representation, because he hired counsel before he was dismissed. Failure to include notice regarding representation in the notice of contemplated action does not constitute a denial of due process.

In summary, Petitioner received all of the process to which he was due in a pre-termination proceeding. He received meaningful notice of the action that was contemplated and he had an opportunity to respond. He did respond, and his responses were considered in reaching the final decision.

V.

CONCLUSION

For the reasons stated above, the hearing officer's determination that Petitioner was properly terminated is AFFIRMED.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

(1) That the findings of fact are not based on any substantial, competent evidence;

(2) That the commission has acted without jurisdiction or in excess of its powers;

(3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this 8th day of July, 1999.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

/s/
Sherry Dyer, Chair

/s/
Peter Boyd

/s/
Ken Wieneke

/s/
Don Miller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Decision and Order on Petition for Review in *Cheney v. Dep't of Correction*, IPC No. 97-15, was delivered to the following parties by the method stated below on the 8th day of July, 1999.

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